

NO. 47249-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PATRICK NEWMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Gary Basher, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

2. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay, making the LFO order erroneous?

2. Was appellant's trial counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged Patrick Newman with possession of a controlled substance based on suspected heroin residue found on a spoon, cotton ball, and hypodermic needle located next to Newman on the seat of his pickup truck. CP 1-5. The residue was later confirmed to contain heroin. CP 23-24. The first jury to hear Newman's case hung, and the trial

court declared a mistrial. 1RP¹ 181. A second jury found him guilty. 2RP 126.

The court granted Newman a first-time offender waiver, sentencing him to 10 days confinement and 12 months community custody. CP 45-46. The court also imposed \$2,125.00 in LFOs. CP 46-47. In doing so, it did not meaningfully consider Newman's ability to pay. The closest the court came to doing so was when defense counsel asked the court not to impose a \$1,000.00 fine. In response, the court asked Newman if he was currently working, and Newman answered that he was. The court then struck the fine. 2RP 136.

The judgment contains the following boilerplate language:

2.5 LEGAL FINANCIAL OBLIGATIONS/
RESTITUTION. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).
The court makes the following specific findings:

X The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP 44. Consistent with the court's failure to consider Newman's specific financial circumstances, this boilerplate language is crossed out on the judgment. CP 44.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – October 28-29, 2014; 2RP – January 27 and February 9, 2015.

Newman timely filed his Notice of Appeal. CP 52.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER NEWMAN'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed three mandatory LFOs: \$500 crime victim assessment, \$100 DNA database fee, and a \$200 criminal filing fee. CP 46-47; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The court also imposed \$1,325.00 in discretionary fees and costs pertaining to incarceration, the appointment of counsel, lab work, and county law enforcement activities. RCW 10.01.160(1), (2); RCW 9.94A.760; State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary). The trial court failed to make an individualized inquiry into Newman's present and future ability to pay before it imposed these discretionary LFOs.

In doing so, the court exceeded its statutory authority, and the discretionary LFO order should be vacated.

The Washington Supreme Court recently recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Id. at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the

defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, the court failed to make an individualized inquiry into Newman's current or future ability to pay \$1,325.00 in discretionary LFOs. 2RP 136. Indeed, as previously noted, that section of the judgment indicating the court has considered Newman's individual financial circumstances has been crossed out. See CP 44. And while the court determined that Newman was working, the court did not determine where, how often, or how much income this provided. See 2RP 136. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. This court should

accordingly vacate the LFO order and remand for resentencing. Id. at 839.

The State may ask this court to decline review of the erroneous LFO order. The Blazina court held that the Court of Appeals “properly exercised its discretion to decline review” under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Id. Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should instead confront the issue head on by vacating Newman’s discretionary LFOs and remanding for resentencing.

2. NEWMAN’S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated

when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to all discretionary LFOs fell below the standard expected for effective representation. Counsel objected solely to imposition of a fine for Newman's conviction. 2RP 136. There was no reasonable strategy for not requesting the trial court comply with the requirements of RCW 10.01.160(3) regarding all discretionary financial liabilities. See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Newman will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Newman incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Newman's current and future ability to pay. Newman's constitutional right to effective assistance of counsel was violated. Therefore, this court should also vacate the LFO order and remand for resentencing on this alternative basis.

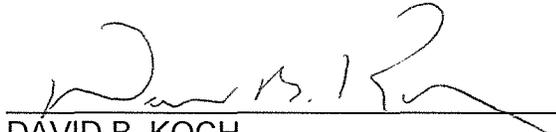
D. CONCLUSION

This court should vacate the LFO order and remand for resentencing.

DATED this 29th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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)	
Respondent,)	
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v.)	COA NO. 47249-0-II
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JUNE 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PATRICK NEWMAN
222 WILLIAMS FINNEY ROAD
KELSO, WA 98626

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2015.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

June 29, 2015 - 4:05 PM

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